IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 20TH FEBRUARY 2007 / 1ST PHALGUNA 1928

Crl.Rev.Pet.No. 724 of 1998()

CRA.171/1996 of SESSIONS COURT, PALAKKAD
CC.297/1994 of JUDL.MAGISTRATE OF FIRST CLASS COURT, ALATHUR

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REVN. PETITIONER(S): APPELLANTS/ACCUSED NOS. 1,3 AND 4.

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1. **BAIJU @ KOCHU, S/O. PAPPACHAN, KURUKKANTHARISU, KORENCHIRA, VADAKKANCHERY, ALATHUR TALUK.**

2. **MURALI @ MURALIDHARAN, S/O.APPUNNI, PLACHIKULAMBU, MOOLAMCODE.**

3. **NARAYANAN , S/O.KRISHNAN, PAZHAMNI, IRRIKKINCHIRA, VADAKKANCHERY, ALATHOOR TALUK.**

BY ADV. SRI.C.VATHSALAN

RESPONDENT(S): RESPONDENT/COMPLAINANT

STATE OF KERALA, REP.BY THE CIRCLE INSPECTOR OF POLICE, ALATHUR REPRESENTED BY PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.K.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 20/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON CRL.MP. 3729/1998 IN CRRP. NO.724/1998

DISMISSED

20/02/2007 **SD/- K.HEMA, JUDGE**

TRUE COPY

P.A. TO JUDGE

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K. HEMA, J.

CRL. R.P. No.724 OF 1998

Dated this the 20th day of February, 2007.

O R D E R

The revision petitioners are the first, third and fourth accused, who were tried for offence under Section 394 read with Section 34 of Indian Penal Code by the Magistrate's Court along with the second accused. After trial, learned Magistrate convicted and sentenced all the accused to undergo rigorous imprisonment for two years under Section 394 IPC. Challenging the conviction and sentence, this revision petition is filed by the first, third and the fourth accused. The second accused suffered the sentence. The first accused is reported expired.

2. The prosecution case is that, on 19.03.1993 at about 9.00 p.m PW1 was going back to his house on a bicycle after closing the arrack shop while all the accused beat him with sticks in order to commit robbery of Rs.600/- from his bag. The fourth accused stopped the cycle. To prove the case, PWs 1 to 11 were examined, Exhibits P1 to P9 and M.Os.1 to 3 were marked on the side of the prosecution.

3. After trial, on the basis of the evidence, trial court found that all accused committed offence of robbery, independently. All the accused filed appeals. The appeals were dismissed, confirming the conviction and sentence. This revision is filed against the concurrent findings of guilt,

conviction and sentence passed against the revision petitioners who are the first, third and fourth accused.

4. As per the court charge, the accused was charge-sheeted for offence under Section 394 and 34 IPC. As per the details in court charge, accused 1 to 4 beat PW1 with sticks on his head, in order to commit robbery. The accused were convicted on finding that they had beaten on the head of PW1 with sticks, as alleged by PW1, with the intention to commit robbery. The finding of guilt on the basis of the above finding is totally illegal and unsustainable for the following reasons.

5. A reading of Section 394 I.P.C shows that in all robbery there is either theft or extortion. In this case, there is no allegation of any theft or extortion. It is only if there is either theft or extortion, an offence under Section 394 will be made out. A reading of Section 378 shows that, in a case of theft, the person who commits theft must have the intention to take dishonestly any movable property out of the possession of any person without that person's consent, and he must also move that property in order to such taking. But, the dishonest intention to move the property from the person's possession without his consent alone will not constitute an offence of theft. With such intention, the person must have also moved that property in order to such taking.

6. In this case, there is absolutely no whisper that any of the accused have committed theft as defined in Section 378 I.P.C. It is only in cases where there is either theft or extortion that robbery will be made out

provided the requirements under Section 390 are established. For this sole reason, I find that the offence under Section 394 is illegally framed and accused were tried wrongly and illegally for offences under Sections 394 and 34 IPC. The conviction and sentence passed against the revision petitioners under Section 394 I.P.C are therefore illegal and those are liable to be set aside.

7. However, there is an allegation that the accused 1 to 4 have beaten PW1 with stick on his head and voluntarily caused hurt on him. Such act comes under Section 324 of IPC. But, no conviction or sentence is passed against the revision petitioners for offence under the said Section. As per the allegations, all the accused have beaten PW1 with stick on his head and it was found that all of them had beaten PW1. The said finding cannot be upheld on the basis of the evidence given by PW1. Even going by the prosecution case, it does not appear that the fourth accused at any time had beaten PW1.

8. Though a general vague statement has been made that all the accused beat PW1 with stick, in the evidence, PW1 has not made any allegation that fourth accused had beaten him. In fact, fourth accused had not even been identified by PW1 while he was examined in court. There is nothing to show that this person was identified, while he was examined in court by sight and by pointing out this person from the box. He only mentioned in the chief examination that, "accused 1, 3 and 4 one Chandran was present" and he had seen such persons in the court. But, there is

nothing in evidence to show that the said person is the fourth accused in the case and was present in the court at the time when he was examined.

9. It has come out from the evidence of PW1 that as per the statement given by PW1 to the police, both in the First Information Statement and while questioned under Section 161 of the Code of Criminal Procedure, he had no previous acquaintance with the accused. His case was that he can identify the accused by sight. He did not mention any of the names of the accused to the police either in Ext.P1 First Information Statement or while he was questioned under Section 161 of the Code. Therefore, it is a case where the court must have insisted for identification of the accused by PW1 in court. But, no where in the deposition it is recorded that the fourth accused was identified from the court.

10. It can also be seen that PW1 did not state that the fourth accused at any time had beaten him with stick. His specific case is that accused 1 and 3 had beaten and he had not implicated the fourth accused for having beaten PW1 with stick. Hence, he cannot be found guilty for beating PW1 with the stick. Regarding the involvement of the other accused in the crime also, the evidence adduced in this case is totally insufficient. The case records will reveal that PW1 during the investigation stage, had not made any statement implicating the accused by name. He had no case that he was previously known to them.

11. But in the court PW1 came forward with a case that accused were known to him previously. He identified them by name. But there is

nothing in the record to show that he identified these accused, when he was examined. In the peculiar facts and circumstances of the case, unless the accused is identified while PW1 was examined, no implicit reliance can be placed on the identity of the accused. This is specially said so, since the accused was brought into the array of accused at a highly belated stage. The case was once closed and then, reopened by arresting the accused on different dates, after a long period, after registering the crime. Even at that stage, nobody had a case that PW1 had identified the accused by name.

12. The explanation given by PW1 regarding the omission to mention about the names of the accused to the police is not at all satisfactory. He said that he did not mention that he was acquainted with accused 1 and 3, since he was afraid of them. He said that he did not also tell PW2 to whom he had gone immediately on sustaining the injury about the identity of the accused. His explanation for this omission is that if this fact is disclosed, PW2 will be reluctant to take him to the hospital. This explanation is totally unsatisfactory. The fact that PW1 did not disclose about the identity of the accused or his previous acquaintance with the accused either to the police or at least to the person to whom he went immediately after the incident raises a reasonable doubt on the veracity of the evidence given by PW1 on the crucial aspect.

The prosecution has failed to prove beyond reasonable doubt that the petitioners were the persons involved in the offences. The petitioners cannot be convicted and sentenced even for offence under Section 324 IPC. The

conviction and sentence passed against the revision petitioners are unsustainable and those are set aside. They are found not guilty and they are acquitted of the offence under Section 394 and 34 IPC. They are set at liberty forthwith.

This revision petition is allowed.

K. HEMA, JUDGE

smp